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Attorneys for Defendants K-M Industries Holding Co. Inc.; K-M Industries Holding Co. Inc. ESOP Plan Committee; and CIG ESOP Plan Committee

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

THOMAS FERNANDEZ, LORA SMITH,
and TOSHA THOMAS individually and on
behalf of a class of all others similarly
situated,

Plaintiffs,

V.

K-M INDUSTRIES HOLDING CO., INC.,
et al.,

Defendants.

Case No. C06-07339 CW

**[REDACTED] DECLARATION
OF JOSEPH CRISTIANO IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT BY
DEFENDANTS K-M INDUSTRIES
HOLDING CO., INC., K-M
INDUSTRIES HOLDING CO. INC.
ESOP PLAN COMMITTEE AND
CIG ESOP PLAN COMMITTEE**

Hearing Date: July 31, 2008

Hearing Time: 2:00 p.m.

Courtroom: 2, 4th Floor

Judge: Hon. Claudia Wilken

I, Joseph Cristiano, hereby declare:

1. I was the President of Kelly-Moore Paint Company, Inc. from 1984 to December, 2002 and Chief Executive Officer ("CEO") from 1986 to December, 2002. I was also on the Board of Directors of Kelly-Moore Paint Company, Inc. until August, 2002. I have personal knowledge of

1 the facts stated herein, and if called as a witness, I would and could testify with respect thereto.

2 2. I submit this Declaration in support of the concurrently-filed Motion for Summary
3 Judgment by defendants K-M Industries Holding Co., Inc., K-M Industries Holding Co., Inc. ESOP
4 Plan Committee and CIG ESOP Plan Committee.

5 3. As President and CEO, one of my duties was to monitor the asbestos litigation facing
6 the company. I first learned of the asbestos litigation affecting Kelly-Moore Paint Company in 1987
7 – 1988 when it was considered to be just a product liability issue similar to those that the company
8 faced everyday. The asbestos lawsuits were either being dismissed or settled for small amounts,
9 typically no more than \$500.

10 4. As the asbestos litigation grew in the late nineties, I engaged an attorney named
11 Cheryl Mills of Pillsbury, Levinson & Mills to review, investigate and monitor the asbestos
12 litigation and the extent of the company's insurance coverage. Ms. Mills reported to me on a regular
13 basis about the extent of our potential asbestos liability and insurance coverage. Ms. Mills also
14 wrote to Ernst & Young, the company's auditors, informing them of our product liability issues and
15 the extent of our insurance coverage.

16 5. [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 A true and correct copy of the February 16,
20 1998 letter from Cheryl Mills to Ernst & Young is attached hereto and made a part hereof as Exhibit

21 1.

22 6. By 1997-1998, the asbestos litigation had grown. [REDACTED]
23 [REDACTED]

24 7. [REDACTED]
25 [REDACTED]

26 [REDACTED] Attached hereto as Exhibit 2 is a true and correct copy of a letter from Cheryl Mills dated

1 December 11, 1998, received by me as President of Kelly-Moore Paint Company, Inc.

2 8. On February 8, 1999, Ms. Mills [REDACTED]

3 [REDACTED]
4 [REDACTED] A true and correct copy of the February 8,
5 1999 letter from Ms. Mills to Ernst & Young is attached hereto and made a part hereof as Exhibit 3.

6 9. [REDACTED]

7 [REDACTED]
8 [REDACTED] Attached hereto as Exhibit 4 is a true and correct copy of a letter from Cheryl Mills dated
9 July 25, 2000 received by me as President of Kelly-Moore Paint Company, Inc. [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 10. In 2001, Kelly-Moore sustained a \$55 million jury verdict in a Texas asbestos case
14 known as the "Hernandez" case. Prior to this case, all of the lawsuits were considered nuisance
15 claims, were relatively minor and were being settled with small amounts. However, after the
16 Hernandez case, Kelly-Moore became a target defendant and the number of lawsuits against Kelly-
17 Moore increased dramatically.

18 I declare under penalty of perjury under the laws of the United States of America that the
19 foregoing is true and correct. Executed at Pleasanton, California this 20th day of June 2008.

20
21
22 _____/s/
23 Joseph Cristiano
24
25

DECLARATION OF JOSEPH CRISTIANO

IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY
DEFENDANTS K-M INDUSTRIES HOLDING CO., INC., K-M
INDUSTRIES HOLDING CO. INC. ESOP PLAN COMMITTEE AND
CIG ESOP PLAN COMMITTEE

Exhibit 1

**ENTIRE DOCUMENT
SUBMITTED UNDER SEAL**

CIVIL L.R. 79-5(b)

(BATES #KMH 007204 - KMH 007205)

DECLARATION OF JOSEPH CRISTIANO

**IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY
DEFENDANTS K-M INDUSTRIES HOLDING CO., INC., K-M
INDUSTRIES HOLDING CO. INC. ESOP PLAN COMMITTEE AND
CIG ESOP PLAN COMMITTEE**

Exhibit 2

**ENTIRE DOCUMENT
SUBMITTED UNDER SEAL**

CIVIL L.R. 79-5(b)

(BATES #KMH 010998 - KMH 011003)

DECLARATION OF JOSEPH CRISTIANO

IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY
DEFENDANTS K-M INDUSTRIES HOLDING CO., INC., K-M
INDUSTRIES HOLDING CO. INC. ESOP PLAN COMMITTEE AND
CIG ESOP PLAN COMMITTEE

Exhibit 3

**ENTIRE DOCUMENT
SUBMITTED UNDER SEAL**

CIVIL L.R. 79-5(b)

(BATES #KMH 007206 - KMH 007207)

MILLS & LARSON
ATTORNEYS AT LAW

CHERYL RAE MILLS

CONFIDENTIAL PRIVILEGED COMMUNICATION

USE OF THIS DOCUMENT IS LIMITED TO THE EXTENT
NECESSARY TO APPRISE BENJAMIN MOORE OF THE
STATUS OF THE PACO ASBESTOS LITIGATION

THIS INFORMATION CANNOT BE USED FOR ANY OTHER PURPOSE
RELEASE OF THIS INFORMATION BY
BENJAMIN MOORE WILL CAUSE IRREPARABLE DAMAGE
TO KELLY-MOORE PAINT COMPANY, INC.

July 25, 2000

Personal & Confidential

Mr. Joseph Cristiano
Kelly-Moore Paint Company, Inc.
P.O. Box 3016
987 Commercial Street
San Carlos, CA 94070

Re: Kelly-Moore/Paco Asbestos Litigation

Dear Mr. Cristiano:

You requested that we provide you with an overview as to the status of the asbestos litigation. As you are aware, Kelly-Moore purchased and then merged with a company called Paco Textures Corporation that manufactured joint compound and ceiling texture products containing asbestos. The company produced asbestos containing products from 1960 to 1978.

There are two types of claims made against Kelly-Moore/Paco; personal injury and property damage. The vast majority of the claims against Paco are for *personal injury*. Paco is also being sued in Hawaii on a *property claim* based on a Paco ceiling texture product that contained asbestos. We see very few property damage claims, because it is difficult for the plaintiff to identify which manufacturer is at a particular site.

The Hawaii litigation involves several government buildings that are being abated or will be abated. Paco did not ship very much product to Hawaii, therefore, our exposure is limited. Counsel appointed by Kelly-Moore's insurance carriers is defending Kelly-Moore. Various primary carriers are funding the defense, but it is possible the excess carriers may become involved if a settlement is reached.



Mr. Joseph Cristiano
July 25, 2000
Page 2

On the personal injury side, Kelly-Moore is being sued in several states. Most of the states have only a few cases. The states with more than a nuisance number of claims are California and Texas. In California, Kelly-Moore usually has about sixty active claims. In Texas, the number is about 22,000 active claims. The plaintiff's asbestos bar in Texas is very aggressive which is one reason for the large number of claims. At the rate claims are being handled, it will take about three years for the pending claims to all be resolved. That estimate is based on the rate at which the claims are set for trial in the Texas courts.

Kelly-Moore has exhausted its primary level of insurance for personal injury claims. It is now into the first level of its excess coverage. (The property damage limits are separate from the personal injury limits on many of the policies. That is why the Hawaii litigation is still being handled at the primary level). There is a third level of umbrella/excess coverage that has not been involved. Currently, approximately 10% of the claims are dismissed with no payment from the carriers. The remaining claims settle for an average of \$5,000 per claim.

Kelly-Moore has sufficient coverage to settle all of the pending claims and those claims made well into the future. It is unknown how many claims will ultimately be made against Kelly-Moore, therefore, it is impossible to say whether there is enough insurance indemnity dollars to cover all claims that may be brought in the years to come. In 2000, the number of new claims has varied. The last figure was six hundred and eighty new claims in April 2000. It is unknown if that number will increase or decrease over the next year.

Please let me know if you require further information.

Sincerely,



Cheryl Rae Mills

CRM/klc

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ATTORNEYS AT LAW

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